90-55

No. ____

FILED
JUL 3 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ILLINOIS WINE & SPIRITS CO.,

Petitioner,

v.

THE COUNTY OF COOK,
BUREAU OF ADMINISTRATION,
and WILLIAM M. DOYLE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST DISTRICT

BARRY LEVENSTAM
(Counsel of Record)
RUSS M. STROBEL
R. EDWARD WILHOITE, JR.
JENNER & BLOCK
Attorneys for Petitioners
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

Of Counsel
MORTON SIEGEL
MICHAEL A. MOSES
JAMES L. WEBSTER
SIEGEL, MOSES & SCHOENSTADT
10 East Huron Street
Chicago, Illinois 60611
(312) 664-8998

Pandick Midwest, Inc., Chicago • (312) 733-6000

QUESTION PRESENTED FOR REVIEW

Did the Illinois Appellate Court err when it held, in conflict with applicable decisions of this Court, that Cook County, Illinois did not deny petitioner equal protection of the laws by its selective enforcement of a tax on the retail sale of alcoholic beverages against petitioner, an out-of-county wholesaler, rather than against in-county retailers that had previously collected the tax, but had failed to remit it to the petitioner or the County?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW.....	i
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	v
OPINIONS BELOW.....	1
JURISDICTION.....	1
STATUTES INVOLVED.....	2
STATEMENT OF THE CASE.....	3
REASONS FOR GRANTING THE WRIT.....	7
I. THIS COURT SHOULD CORRECT AN ERRONEOUS STATE COURT DECISION ON AN IMPORTANT CONSTITUTIONAL ISSUE.....	7
II. THE FACTS OF THIS CASE AND THE POTENTIAL FOR REPEATED HARM SUGGEST THAT THIS COURT SHOULD GRANT THE WRIT.....	17
CONCLUSION.....	20
APPENDIX.....	A-1
1. OPINION OF THE ILLINOIS APPELLATE COURT.....	A-1
2. MEMORANDUM DECISION OF THE CIRCUIT COURT.....	A-26
3. JUDGMENT ORDER OF THE CIRCUIT COURT.....	A-46
4. ORDER OF THE APPELLATE COURT DENYING PETITION FOR REHEARING.....	A-47

Page

5. ORDER OF THE ILLINOIS SUPREME COURT DENYING PETITION FOR LEAVE TO APPEAL..... A-48

6. COOK COUNTY ORDINANCE TO PROVIDE FOR A TAX ON THE RETAIL SALE OF ALCOHOLIC BEVERAGES..... A-49

7. BRIEF AND ARGUMENT OF PLAINTIFF-APPELLANT [EXCERPTED].... A-62

TABLE OF AUTHORITIES

Cases	Page
Allegheny Pittsburgh Coal Co. v. County Comm'n, 109 S.Ct. 633 (1989)	12
Brandon v. District of Columbia Bd. of Parole, 734 F.2d 56 (D.C. Cir. 1984), cert. denied, 469 U.S. 1127 (1985)	17
Ciechon v. City of Chicago, 686 F.2d 511 (7th Cir. 1982)	8
Creative Environments, Inc. v. Estabrook, 680 F.2d 822 (1st Cir.), cert. denied, 459 U.S. 989 (1982)	15
Davis v. Alaska, 415 U.S. 308 (1974)	18
Florida v. Rodriguez, 469 U.S. 1 (1984)	17
Griffin v. Illinois, 351 U.S. 12 (1956)	8
Kendrick v. Walder, 527 F.2d 44 (7th Cir. 1975)	9
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1981)	17
Matthews v. Lucas, 427 U.S. 495 (1976)	16
McCulloch v. Maryland, 17 U.S. 316 (1819)	19
Mulligan v. Dunne, 61 Ill.2d 544, 338 N.E.2d 6 (Ill. 1975), cert. denied, 425 U.S. 916 (1976)	11

Cases Page

New York Transit Authority v. Beazor, 440 U.S. 568 (1979)..... 18

North Sheffield, Inc. v. City of Chicago, 144 Ill. App. 3d 913, 494 N.E.2d 711 (Ill. App. Ct. 1986)..... 11, 12

Oyler v. Boles, 368 U.S. 448 (1962)..... 8

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979)..... 9, 16

Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968)..... 18

Tibbs v. Florida, 457 U.S. 31 (1982)..... 17

WHYY, Inc. v. Borough of Glassboro, 393 U.S. 117 (1968)..... 14

Wayte v. United States, 470 U.S. 598 (1985)..... 9

Wheeling Steel Corp. v. Glander, 337 U.S. 562 (1949)..... 14

Yick Wo v. Hopkins, 118 U.S. 356 (1886)..... 8

OPINIONS BELOW

The opinion of the Illinois Appellate Court, First District is reported at 191 Ill. App. 3d 924, 548 N.E.2d 416, and included in the Appendix at A-1. The memorandum decision of the Circuit Court of Cook County, Illinois, County Department, Chancery Division (O'Brien, J.) is not reported. It is included in the Appendix at A-26.

JURISDICTION

On November 27, 1989 the Illinois Appellate Court affirmed the decision of the trial court denying Illinois Wine & Spirits Co.'s motion for summary judgment and granting the county's motion for summary judgment. On January 2, 1990, the court denied the petition for rehearing. On April 4, 1990, the Illinois Supreme Court denied the petition for leave to appeal from the Appellate Court. This

Court has jurisdiction to review the judgment below by writ of certiorari pursuant to 28 U.S.C. § 1257.

STATUTES INVOLVED

The constitutional provision involved in this petition is the fourteenth amendment to the United States Constitution, which provides in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The ordinance involved in this petition is the Cook County Tax on the Retail Sale of Alcoholic Beverages, which is included in the Appendix at A-49.

STATEMENT OF THE CASE

Illinois Wine & Spirits Co. ("IWS") is located in Will County, Illinois and is engaged in the business of distributing and selling at wholesale various alcoholic beverages.[1/] On June 17, 1982, IWS received notice from the Chief Administrative Officer of Cook County, Illinois (collectively with all respondents, the "County") of a tax liability of $47,468.16, together with interest in the additional amount of $55,913.39, for the period January 1, 1976

1/ Pursuant to Supreme Court Rule 29.1, IWS states that IWS is an unincorporated division of Federated Industries, Inc. ("Federated"), an Illinois corporation. When this action was filed, IWS was an incorporated division of Federated.

to December 31, 1978. This tax liability was purportedly due under the County's Tax on the Retail Sale of Alcoholic Beverages ("Ordinance") and was based upon isolated sales of alcoholic beverages to 15 Cook County retailers, who had themselves collected the tax from their customers but had failed to remit the tax to the County as required by the Ordinance.[2/]

[2/] The Ordinance imposes a tax, to be paid by the purchasers, on the retail sale in Cook County of all alcoholic beverages. The Ordinance provides that the tax "shall be collected by each wholesale dealer of alcoholic beverages who sells alcoholic beverages to a retail dealer of alcoholic beverages doing business in Cook County." (Ordinance, Sec. 1; Appendix at A-50.) The Ordinance also provides that if any retailer receives liquor "upon which no tax has been collected by the distributor or supplier, then the retail operator shall collect such tax and remit directly to the Cook County Collector." (Id. at A-51.)

The County, pursuant to court order in an unrelated action and over the objection of IWS, had previously inspected IWS' records for the years 1976-78 assertedly "to determine whether any retailer or wholesaler has collected

(continued...)

Rather than accede to the County's demand for payment, IWS filed a complaint against the County seeking both injunctive and declaratory relief. In Count II of the Complaint, IWS alleged that the County, by its selective and arbitrary enforcement of the Ordinance, had violated IWS' right to equal protection of the laws guaranteed by the fourteenth amendment to the United States Constitution. (Complaint, Count II; Record on Appeal at C-2.) The County filed a counterclaim for the amount allegedly due it from IWS.

The parties filed cross-motions for summary judgment. The trial court granted

---

2/ (...continued)
the tax and not transmitted it." (Brief and Argument of Plaintiff-Appellant ("Brief"), p. 4 n.1; Appendix at A-63.) Subsequent to this investigation, IWS received the notice of tax liability, although the County knew IWS had not collected the tax. The County attempted to recover the tax from only one of the fifteen retailers that had in fact collected the tax. Significantly, none of the retailers has passed the tax amounts collected on to IWS.

the County's motion and denied IWS' motion. The court concluded, among other things, that the County's selective enforcement of the Ordinance did not violate the fourteenth amendment in that the evidence presented did not show that the County had engaged in invidious discrimination. (Appendix at A-40 - A-41.) At trial on the County's counterclaim, testimony was adduced to show that where a retailer fails to pay the tax on liquor purchased from an out-of-county wholesaler, the County will try to collect the tax from that retailer. (Appendix at A-65.) The testimony also showed that the County finds it more economical to have the wholesaler collect and remit the tax to the County. (Appendix at A-65.) The court entered judgment against IWS for $154,729.12, inclusive of interest.

On appeal, IWS again raised the issue of whether the Ordinance, as applied,

constituted a violation of the equal protection clause contained in the fourteenth amendment. (Brief, pp. 18-22; Appendix at A-66 - A-73.) The appellate court affirmed the trial court's judgment. In rejecting IWS' equal protection argument, the court first held that IWS was not similarly situated with the 15 retail dealers as classified under the Ordinance. (Appendix at A-15.) The court further held that IWS had not offered any factual evidence to support its claim that the County had acted with intentional and purposeful discrimination. (Appendix at A-18.) The court denied IWS' petition for rehearing.

REASONS FOR GRANTING THE WRIT

I. This Court Should Correct An Erroneous State Court Decision On An Important Constitutional Issue.

It is axiomatic that although a law may be fair on its face, "if it is applied and administered by a public authority with

an evil eye and an unequal hand, . . . the denial of equal justice is still within the prohibition of the Constitution." Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886); see also Griffin v. Illinois, 351 U.S. 12, 17 n.11 (1956) (a law nondiscriminatory on its face may be grossly discriminatory in its operation). Equal protection requires "at a minimum that a municipality must apply its laws in a rational and nonarbitrary way." Ciechon v. City of Chicago, 686 F.2d 511, 522 (7th Cir. 1982).

Although a municipal corporation may choose to enforce its laws selectively and still remain within the confines of the fourteenth amendment, it may not make its selection "based upon an unjustifiable standard such as race, religion, or other arbitrary classification." Oyler v. Boles, 368 U.S. 448, 456 (1962). Thus, "it is appropriate to judge selective prosecution claims according to ordinary equal

protection standards." Wayte v. United States, 470 U.S. 598, 608 (1985). Where a decisionmaker "select[s] or reaffirm[s] a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group," he or she has acted with the discriminatory purpose proscribed by the equal protection clause of the fourteenth amendment. Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979); see also Kendrick v. Walder, 527 F.2d 44, 47 n.3 (7th Cir. 1975) (an administrative decision that misinterprets or distorts a valid state law can result in a denial of equal protection where there is an intent to discriminate).

Under the applicable equal protection standards articulated by this Court, the Illinois appellate court clearly erred in holding that the County's selective

enforcement against IWS was neither arbitrary nor irrational.

Upon a strained reading of the Ordinance, the Illinois appellate court held that the Ordinance did not place wholesale and retail dealers in the same class because the wholesaler had primary collection responsibility and, therefore, "[IWS] cannot claim [it] was denied equal protection as a result of disparate treatment." (Appendix at A-17 -A-18.) This construction is patently inconsistent with the language and prior judicial interpretation of the Ordinance.

The Ordinance expressly provides that where, as here, the wholesale dealer has not collected the tax, the retailer has the primary responsibility to collect and remit the tax to the County. (Ordinance, Sec.1; Appendix at A-51.) The fact that under different circumstances both the wholesale dealer and the retail dealer are to collect

the tax indicates that the true classifications established by the Ordinance are those of "collector" and "purchaser."

This reading was confirmed by the Illinois Supreme Court in Mulligan v. Dunne, 61 Ill.2d 544, 338 N.E.2d 6 (1975), cert. denied, 425 U.S. 916 (1976). The Illinois Supreme Court there recognized that the basic collection system of the Ordinance, as delineated by the administering agency, and which required the retailer to collect and remit the tax in some instances, was "consistent with the intent of the ordinance to tax all retail sales." Id. at 554, 338 N.E.2d at 13 (emphasis added).[3/]

[3/] All retail liquor licensees in Cook County are required to maintain records of liquor sales for purposes of state and county tax laws. North Sheffield, Inc. v. City of Chicago, 144 Ill. App. 3d 913, 921, 494 N.E.2d 711, 716 (Ill. App. Ct. 1986). The fact that the Ordinance also requires wholesalers to maintain such records

(continued...)

As collectors, which is the assigned function of both wholesalers and retailers under the Ordinance, there is no substantive distinction between one and the other. Accordingly, the classification distinguishing between them articulated by the County (and accepted by the court below) is no more than "an arbitrary distinction which bears no reasonable relationship to the revenue-raising purpose of the ordinance." North Sheffield, Inc. v. City of Chicago, 144 Ill. App. 3d 913, 920, 494 N.E.2d 711, 715 (Ill. App. Ct. 1986). Instead, the County's action against IWS, admittedly inconsistent with its general collection procedure, appears to be merely an "aberrational enforcement policy" that, as such, denies IWS equal protection of the law. Allegheny

---

3/ (...continued)
provides further evidence that wholesalers and retailers are statutorily classified together as collectors.

Pittsburgh Coal Co. v. County Comm'n, 109 S.Ct. 633, 638, 638 n.4 (1989).

The County cannot, through the artifice of arbitrary classifications and contrived administrative burden,[4/] discriminate against nonresident wholesalers doing business in Cook County to benefit its resident retail dealers. By its selective and irrational enforcement of the Ordinance against out-of-county wholesalers, particularly where, as here,

---

[4/] The County's argument that it is less burdensome to collect the tax from IWS rather than the 15 retailers is disingenuous. The County, as a result of audits already conducted, knew the names of the 15 retailers and the dates of and amounts involved in each retail transaction prior to its notice of tax liability to IWS. The County knew exactly the amount of tax due and that the retailers had already collected this tax. In fact, when the County requested the tax from one retailer, the retailer complied promptly. Incredibly, however, the County neglected to request from any other retailer the tax collected due to the "administrative burden" such efforts would entail. Instead, the County, in bad faith, has attempted to collect the tax from an out-of-county wholesaler in a manner wholly inconsistent with the Ordinance.

the in-county retail dealers have already collected the tax, the County is attempting to place an unfair burden upon an out-of-county competitor. Such efforts to protect parochial economic interests have consistently been held by this Court to deny persons equal protection of the law under the fourteenth amendment. See, e.g., WHYY, Inc. v. Borough of Glassboro, 393 U.S. 117 (1968) (denial of tax exemption solely on the basis of domicile violates equal protection clause); Wheeling Steel Corp. v. Glander, 337 U.S. 562 (1949) (imposing property tax only on nonresidents and foreign corporations is a denial of equal protection).

The court below also incorrectly held that IWS had not presented any evidence of invidious discrimination. (Appendix at A-18.) First, a person may be denied equal protection of the law by "gross abuse of power, invidious discrimination, or

fundamentally unfair procedures." Creative Environments, Inc. v. Estabrook, 680 F.2d 822, 832 n.9 (1st Cir.), cert. denied, 459 U.S. 989 (1982) (emphasis added). The County is attempting to collect tax under the Ordinance from IWS in spite of the fact that the 15 retailers have already collected the tax, but have failed to remit the amount due as the Ordinance requires. Not only is this windfall to the retailers unwarranted and unanticipated by the Ordinance, it is also grossly unfair to and abusive of IWS and therefore denies IWS equal protection of the law.

Second, IWS presented clear and convincing evidence, apparently ignored by the court, that the County acted with a discriminatory purpose. It is the normal procedure of the County to seek payment of the tax from the retailer when an out-of-county wholesaler sells to county retailers. (Brief, p. 8; Appendix at A-

65.) The County also had inspected IWS' records in order to determine (reasonably) whether IWS or any retail dealer had collected the tax, but had failed to remit that tax to the County. However, although it successfully determined that the 15 retailers had done that very thing, the County, (acting inconsistently with the Ordinance), rather than pursue the in-county retailers, sought to collect the tax from IWS. This evidence of irrational behavior is sufficient to establish discriminatory intent. See Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 n.24 (1979) (inference can support finding of discriminatory purpose).

The "rational basis" standard applicable to economic regulations under the fourteenth amendment "is not a toothless one." Matthews v. Lucas, 427 U.S. 495, 510 (1976). The equal protection

clause requires "at the least . . . that the state act 'sensibly and in good faith.'" Brandon v. District of Columbia Bd. of Parole, 734 F.2d 56, 60 (D.C. Cir. 1984), cert. denied, 469 U.S. 1127 (1985) (quoting Logan v. Zimmerman Brush Co., 455 U.S. 422, 438 (1981) (Blackmun, J., concurring). The County has not, and this Court should correct this clear and gross error of constitutional law.

II. The Facts Of This Case And The Potential For Repeated Harm Suggest That This Court Should Grant The Writ.

This Court has not hesitated to grant a writ of certiorari to correct an error in a state court's application of settled federal constitutional principles. See, e.g., Florida v. Rodriguez, 469 U.S. 1 (1984) (granting petition to review factual findings inconsistent with 4th amendment law); Tibbs v. Florida, 457 U.S. 31 (1982) (to review doubtful interpretation of

Double Jeopardy Clause); Davis v. Alaska, 415 U.S. 308 (1974) (to review erroneous state court interpretation of Confrontation Clause). The Illinois appellate court has made such an error in its interpretation of the fourteenth amendment's equal protection clause. That error, which goes to the essence of the transactional relationship between the state and its citizens, is unduly harsh in result and should not stand uncorrected.

Moreover, where a state court has committed error that is of recurring significance, this Court has granted certiorari. See, e.g., New York Transit Authority v. Beazor, 440 U.S. 568, 571 (1979) (certiorari granted because of concern that merits of "these important questions" were decided erroneously); Perma Life Mufflers v. International Parts Corp., 392 U.S. 134, 136 (1968). The propriety of this practice is equally applicable

where, as here, the harm created by the erroneous decision is likely to recur with the same wronged party. IWS will repeatedly be subjected to the County's improper application of the Ordinance -- with its concomitant economic cost -- without any meaningful recourse to the courts. At the same time, the in-county retailers will retain an undeserved windfall. Neither the Ordinance nor the Constitution permit this result.

It is a time-honored maxim that "the power to tax involves the power to destroy." McCulloch v. Maryland, 17 U.S. 316, 431 (1819). This Court should not subject IWS to such a risk by allowing the County to tax arbitrarily and irrationally.

CONCLUSION

For the reasons stated above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

BARRY LEVENSTAM
(Counsel of Record)
RUSS M. STROBEL
R. EDWARD WILHOITE, JR.

Attorneys for Petitioner

Of Counsel:

MORTON SIEGEL
MICHAEL A. MOSES
JAMES L. WEBSTER

Appendix

ILLINOIS WINE & SPIRITS CO.,
Plaintiff-Appellant,

v.

The COUNTY OF COOK, Bureau of Administration and William M. Doyle,
Defendants-Appellees.

No. 1-87-3567.

Appellate Court of Illinois
First District, Fifth Division

Nov. 27, 1989.

Rehearing Denied Jan. 2, 1990.

Justice LORENZ delivered the opinion of the court:

Plaintiff, Illinois Wine & Spirits Co., appeals from an order granting judgment in favor of defendants, the County of Cook, Bureau of Administration, and William M. Doyle, assessing a tax liability against plaintiff. Plaintiff raises constitutional issues concerning the Cook County Retail Sale of Alcoholic Beverages Tax §§ 13-95 to 13-105 (1975). We address

the issues of whether the tax ordinance as applied to plaintiff, an out-of-county wholesaler, is an occupation tax, violates equal protection, and is an extra-territorial application of the tax. For the following reasons, we affirm.

Plaintiff filed a three-count complaint, as amended, for declaratory and injunctive relief against defendants alleging the following facts. Plaintiff was a wholesale dealer of alcoholic beverages located in Will County, Illinois, and received written notice from defendants of a tax liability under the ordinance. The tax liability including interest was $103,381.55 for the period from January 1, 1976, through December 31, 1978. Plaintiff filed a written protest of the tax. Plaintiff alleged that the tax was unconstitutional because it was an occupation tax, it violated equal

protection, and it was an extraterritorial application of Cook County's taxing power.

Defendants answered the complaint denying the material allegations and filed a counterclaim for the tax liability. Defendants alleged that plaintiff sold alcoholic beverages at wholesale to 15 different retail dealers in Cook County from 1976 to 1978. The tax due on plaintiff's sales of alcoholic beverages to retailers doing business in the county was $47,468.16 and the interest on that amount was $55,913.39. Plaintiff refused to pay. In their counterclaim, defendants sought judgment against plaintiff for the tax due plus interest.

Plaintiff answered the counterclaim denying the material allegations.

Plaintiff moved for summary judgment arguing that the tax was an unconstitutional occupation tax, violated equal protection, and was an extra-

territorial application of the county's taxing power. Defendant filed a cross-motion for summary judgment on the same issues.

The trial court denied plaintiff's motion for summary judgment and granted defendants' motion for summary judgment. The case was continued to determine the amount of plaintiff's tax liability. Following a trial, the court entered judgment in defendants' favor in the amount of $154,729.12 for tax and interest. Plaintiff's motion for reconsideration was denied and it now appeals.

OPINION

The Illinois Constitution of 1970 established home rule units of local government and their powers are explained in this manner: "[e]xcept as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs

including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt." Ill. Const. 1970, art. VII, § 6(a).

Cook County passed the ordinance in question pursuant to its home rule powers. The ordinance imposed a tax on the retail sale of alcoholic beverages occurring in the county. Alcoholic beverages were taxed by the gallon at various rates depending on the type of alcoholic beverage. The ordinance recited, "The ultimate incidence of and liability for payment of the tax herein levied is to be borne by the consumer of said alcoholic beverages." (Cook County Retail Sale of Alcoholic Beverages Tax § 13-95 (1975).) Each wholesale dealer of alcoholic beverages was required to collect the tax when it sold alcoholic beverages to a retail dealer doing business in Cook County. The retail

dealer was required to collect the tax from the consumers of alcoholic beverages. A wholesale dealer was defined as, "[a]ny person who engages in the business of selling or supplying alcoholic beverages to any person for resale in the County of Cook." (Cook County Retail Sale of Alcoholic Beverages Tax § 13-103(d).) Wholesale dealers were required to register with the county, file monthly reports of sales of alcoholic beverages, and remit the tax applicable to the sales. Violations of the ordinance could incur a fine between $100 and $1000, and/or imprisonment up to six months. In addition, the county could institute civil proceedings to recover the tax due plus interest, penalty and costs. Cook County Retail Sale of Alcoholic Beverages Tax §§ 13-95 to 13-105 (1975).

An ordinance carries a presumption of constitutionality and the burden of overcoming that presumption rests on the

party challenging the ordinance. Mulligan v. Dunne (1975), 61 Ill.2d 544, 338 N.E.2d 6.

I.

Initially, plaintiff argues that the county ordinance imposes an occupation tax in violation of article VII, section 6(e), of the Illinois Constitution of 1970, which provides:

> "A home rule unit shall have only the power that the General Assembly may provide by law * * * to license for revenue or impose taxes upon or measured by income or earnings or upon occupations." (Ill. Const. 1970, art. VII, § 6(e).)

As a home rule unit, Cook County would require approval from the General Assembly to impose a tax on occupations. Mulligan, 61 Ill.2d 544, 338 N.E.2d 6.

Plaintiff concedes that our supreme court has previously reviewed the ordinance involved in the present appeal and found that it did not impose an unconstitutional occupation tax. (See Mulligan, 61 Ill.2d 544, 338 N.E.2d 6.) In Mulligan, plaintiffs, who included wholesale dealers of alcoholic beverages, argued, among other issues, that the ordinance was a tax on occupations and as a home rule unit, the county did not have the power to enact such a tax without authorization from the General Assembly. Plaintiffs argued that as a result, the ordinance was unconstitutional under article VII, section 6(e), of the Illinois Constitution of 1970. The court found, however, that the ordinance did not impose an unconstitutional occupation tax because the tax was levied on retail sales and paid by the consumer.

Despite recognizing the holding in Mulligan, plaintiff argues that because it

never collected the tax from the retail dealers, requiring plaintiff to pay the tax would have the "practical effect" of imposing the tax on the wholesale dealer rather than the consumer of alcoholic beverages as the ordinance provides.

In support of this argument, plaintiff relies on Commercial National Bank v. City of Chicago (1982), 89 Ill.2d 45, 432 N.E.2d 227, where the supreme court considered a constitutional challenge to a Chicago ordinance imposing a tax on services. The ordinance stated the tax was imposed on the purchaser but the collection and remittance duties were placed on the seller who was also liable for the uncollected taxes. The court examined the "practical operation and effect" of the tax and found that even though the ordinance stated the legal incidence of the tax was on the purchaser, the legal obligation was placed on the seller of service and therefore, it was an

occupation tax. (Commercial, 89 Ill.2d at 65, 432 N.E.2d at 236.) The service tax ordinance attempted to convert an occupation tax into a tax on consumers merely by stating that the tax was to be paid by the consumer.

Plaintiff contends that Commercial involved a similar situation to the one presented and this court should similarly find the ordinance is unconstitutional. However, plaintiff's reliance on Commercial is misplaced. The court in Commercial used a practical-effect analysis to determine whether the service tax was constitutional because the delegates to the 1970 constitutional convention intended that such a tax was to be outside the scope of home rule unit powers. The court examined the constitutional debates and found that the intention to restrict home rule units from imposing an occupation tax encompassed the taxing of services. The

court specifically distinguished from its analysis taxes which the delegates considered within a home rule unit's power, such as a tax on liquor which is involved in the present case. Citing Mulligan and other previous decisions where the power of a home rule unit to impose certain taxes was upheld, the court distinguished them from the service tax under review because they "[fell] within the area of taxation which the debates and the examples [in the report of the Local Government Committee of the Convention] show were understood by the convention to be encompassed within the power 'to tax'." (Commercial, 89 Ill.2d at 58, 432 N.E.2d at 233.) Accordingly, the practical-effect analysis of Commercial is not applicable to the present case. See also Illinois Gasoline Dealers Association v. City of Chicago (1988), 119 Ill.2d 391, 519 N.E.2d 447; Chicago Health Clubs, Inc.

v. Picur (1988), 124 Ill.2d 1, 528 N.E.2d 978 (Ryan, J., specially concurring).

Plaintiff has not met its burden in overcoming the presumption of constitutionality of the ordinance. Following Mulligan, we find the tax in question was imposed on the purchaser of alcoholic beverages and was not an occupation tax.

II.

Plaintiff also argues that the enforcement of the tax against it violates equal protection under the United States Constitution (U.S. Const., amend. XIV) and the Illinois Constitution of 1970 (Ill. Const. 1970, art. I, § 2).

The United States Supreme Court explained violations of equal protection in the application of laws in this manner:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by

> public authority with an evil eye and unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." (Yick Wo v. Hopkins (1886), 118 U.S. 356, 373-74, 6 S.Ct. 1064, 1072-73, 30 L.Ed. 220, 227.)

Equal protection requires that the laws are applied in a "rational and nonarbitrary way." (Ciechon v. City of Chicago (1982), 686 F.2d 511, 522.) The application of laws must not constitute "intentional invidious discrimination * * * against persons similarly situated." Ciechon, 686 F.2d at 522-23.

Plaintiff argues that wholesale dealers and retail dealers are similarly situated as collectors of the tax under the ordinance. Therefore, the county's enforcement of the tax against plaintiff, rather than the retail dealers it sold liquor to, is an arbitrary and irrational application of the ordinance and is a denial of equal protection.

Plaintiff relies on Ciechon, 686 F.2d 511, which involved two paramedics, working as a team, who responded to an emergency call and examined a patient. The patient died shortly after the paramedics left. The patient's family complained to the city that the paramedics gave improper treatment. They also contacted a local television station. The city investigated the complaint and one paramedic was subsequently discharged. That paramedic brought a civil rights action against the city alleging a denial of equal protection.

Judgment was entered in favor of the paramedic. On review, the court found the paramedic was denied equal protection because the city acted in an arbitrary, irrational manner. Both paramedics were equally responsible for the treatment of patients and therefore, similarly situated. Yet only one paramedic was singled out for discipline, apparently in response to negative publicity. The court found that "[t]here was no possible justification for treating them differently." (Ciechon, 686 F.2d at 523.) The evidence showed the discrimination was intentional and therefore, equal protection was violated.

Initially, we are not persuaded by plaintiff's argument that it is similarly situated with the 15 retail dealers. A review of the ordinance reveals that the primary collection duties were placed on the wholesaler. In section 13-95, the ordinance states, "the tax herein levied

shall be collected by each wholesale dealer of alcoholic beverages who sells alcoholic beverages to a retail dealer of alcoholic beverages doing business in Cook County." (Cook County Retail Sale of Alcoholic Beverages Tax § 13-95 (1975).) Further, section 13-95 explains that the retail dealer must then collect the tax from the purchaser. Section 13-96 requires that all wholesale dealers doing business in the county to register with the county and file a report of sales each month accompanied by the tax collected on those sales. Cook County Retail Sale of Alcoholic Beverages Tax § 13-96 (1975).

Plaintiff argues that the retail dealer has equivalent collection duties as the wholesale dealer relying on section 13-95 of the ordinance which provides that if the retail dealer obtains liquor on which no tax was collected by the "distributor or supplier," then the retail dealer must

submit the tax directly to the county. Cook County Retail Sale of Alcoholic Beverages Tax § 13-95 (1975).

Unlike the paramedics in Ciechon, plaintiff and the 15 retail dealers did not share equal responsibilities. Although both the wholesale dealer and the retail dealer have collection duties under the ordinance, the primary responsibility is placed on the wholesale dealer as evidenced by the requirement that the wholesale dealer register with the county, collect the tax, file monthly reports, and remit the tax. Only when the retailer receives liquor from a distributor or supplier on which the tax was not paid does its duty come into play under section 13-95. Under the ordinance wholesale and retail dealers were not placed in the same class and therefore, plaintiff cannot claim he was denied equal protection as a result of

disparate treatment between wholesale and retail dealers.

Further, plaintiff has not set forth any evidence of invidious discrimination. Plaintiff argues the alleged disparate treatment occurred because the county could have proceeded against the 15 retailers and because plaintiff challenged the county's right to inspect its books in previous litigation (see County of Cook v. Illinois Wine & Spirits (1981), 93 Ill.App.3d 710, 417 N.E.2d 812). However, unlike Ciechon, there is no factual evidence to support plaintiff's claim that the county acted with intentional and purposeful discrimination. Accordingly, plaintiff was not denied equal protection.

III.

Lastly, plaintiff argues that the county's imposition of collection duties on it, an out-of-county wholesale dealer,

amounts to an unconstitutional extraterritorial application of the tax.

Although "a home rule unit may exercise any power and perform any function pertaining to its government and affairs, including * * * the power * * * to tax" (Ill. Const. 1970, art. VII, § 6(a)), our supreme court has found that home rule units do not have extraterritorial governmental powers (City of Carbondale v. Van Natta (1975), 61 Ill.2d 483, 388 N.E.2d 19). A home rule unit can only act outside its territory when it has the approval of the legislature. Van Natta, 61 Ill.2d 483, 338 N.E.2d 19.

In Mulligan, 61 Ill.2d 544, 338 N.E.2d 6, which was discussed earlier, plaintiffs, who included wholesale dealers of alcoholic beverages, challenged the constitutionality of the ordinance. Similar to plaintiff in the present case, plaintiffs in Mulligan argued that as a home rule unit the county

could not require wholesale dealers located outside the county to collect the tax because it was acting extraterritorially. The Illinois Supreme Court disagreed and stated:

> "But the crucial inquiry is * * * whether any local unit of government is exercising its taxing power extraterritorially by collecting a tax from sellers located outside the boundaries of the local unit which do business within those boundaries. We think it is not. An ordinance is presumed valid, and the burden of establishing invalidity rests upon those asserting it; that burden has not been met in this case. Perhaps factual situations may be hypothesized in which enforcement of this ordinance as

> to out-of-county wholesalers would raise substantial constitutional questions. Those facts are not presented here and we may not assume that enforcement of the ordinance will be attempted under circumstances which would constitute an extraterritorial exercise of taxing power." (Mulligan, 61 Ill.2d at 558, 338 N.E.2d at 15.)

Subsequent to Mulligan, the supreme court decided Commercial, 89 Ill.2d 45, 532 N.E.2d 227, which involved the constitutionality of an ordinance imposing a service tax. The ordinance taxed the total value of services when they were "substantially performed" in the city although some portion of the services were performed outside the city. (Commercial, 89 Ill.2d at 76, 432 N.E.2d at 242 (quoting Municipal Code of Chicago § 200.5-3

(1981).) The court struck down the ordinance finding it exceeded the territorial limits of home rule units because it taxed services performed outside the city. The court distinguished the tax involved in Mulligan and stated:

> "it was the sale of alcoholic beverages within the county which was being taxed [in Mulligan]. We indicated there that it was not an extraterritorial exercise of home rule powers to impose tax-collection duties upon a nonresident wholesaler who did business within the county. * * * In all our previous decisions on the home rule units' taxing power, the commodities or services taxed were purchased or used within the territorial limits of the taxing entity." (Emphasis in

original.) Commercial, 89 Ill.2d at 78, 432 N.E.2d at 243.

As Stated in Mulligan and Commercial, the ordinance involved here placed a tax on the retail sale of alcoholic beverages occurring within the county. The tax is imposed on the consumer. The right of the county to impose collection duties on an out-of-county wholesaler doing business in the county was approved in Mulligan. The court in Mulligan noted that in some instances, enforcement against out-of-county wholesale dealers could raise "substantial constitutional questions." (Mulligan, 61 Ill.2d at 558, 338 N.E.2d at 15.) The present case does not involve an unconstitutional enforcement of the ordinance.

Plaintiff argues it does not conduct business within the county because it does not maintain an office, have a telephone line, or advertise in the county. Also,

plaintiff did not apply for license within the county or file a tax return with the county. These factual assertions were made with no more support in the record than plaintiff's "Memorandum of Issues" and motion for summary judgment filed in the trial court. Further, plaintiff cites the deposition testimony of two retail dealers who testified that they purchased liquor from plaintiff only a few times and one retail dealer could not remember dealing with plaintiff at all. Such testimony is clearly irrelevant in light of the fact that plaintiff does not challenge the amount of the tax liability assessed against it.

Contrary to plaintiff's claim, it is clear from the record that from 1976 through 1978 plaintiff conducted business within the county when it supplied 15 different retail dealers with wholesale alcoholic beverages for retail sale within

the county. Plaintiff's sales resulted in a tax liability of approximately $45,000. Accordingly, plaintiff's argument that it did not conduct business in the county is without support in the record. The county has not exercised extraterritorial powers in enforcing the tax against plaintiff.

Affirmed.

PINCHAM and COCCIA, JJ., concur.

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CHANCERY DIVISION

ILLINOIS WINE & SPIRITS CO., an Illinois Corporation,

Plaintiff,

vs.

THE COUNTY OF COOK, a body politic and municipal corporation, Bureau of Administration, and WILLIAM M. DOYLE, as Chief Administrative Officer,

Defendants.

Case No. 82 CH 5963

O'Brien, J.

Memorandum Decision July 7, 1986

Illinois Wine & Spirits Co. has filed its motion for summary judgment on Counts I & III of its Complaint for Declaratory Judgment, claiming that the Cook County Ordinance, entitled "Tax on the Retail Sale of Alcoholic Beverages," is unconstitutional in its application in that the tax imposed violates Article VII Section 6(e) of the Illinois Constitution. A similar

summary judgment motion on Count II was filed claiming the same tax violated the Equal Protection Clause of the 14th Amendment as well as Article I Section 2 of the Illinois Constitution. The defendants have filed a cross motion for summary judgment.

It is to be noted at the outset that there is a strong presumption that legislative enactments are constitutional. People v. Greene, 96 Ill.2d 334 (1983). Further, the party who asserts a law's unconstitutionality has the burden of clearly establishing the constitutional violation. Polyvend, Inc. v. Puckorius, 77 Ill.2d 287 (1979).

The plaintiff raised three arguments for striking down the ordinance. The Court will entertain them in the order raised.

I

The first issue is whether the tax in question is an occupational tax violative

of Article VII Section 6(e) of the Illinois Constitution.

Article VII Section 6(e) states:

> A home rule unit shall have only the power that the General Assembly may provide by law . . . to license for revenue or impose taxes upon or measured by income or earnings or upon occupations.

An occupation tax is one that regulates or controls a given business or occupation or imposes a tax on the privilege of operating a trade or business. Reif v. Barrett, 355 Ill. 104 (1933).

The challenged ordinance places a tax upon the consumer of alcoholic beverages by placing a tax on the retail sale and failure of the retailer to include the tax or absorb the tax is a violation of the ordinance (Section 1); the ordinance requires the wholesaler to collect the tax from the retailer and he is required to report monthly sales to the County collector (Section 2); reasonable rules and

regulations are to be enacted allowing for the appointment of wholesalers as agents (Section 3); the act allows the County to inspect wholesalers and retailers books and records (Section 4); penalties for violations are prescribed (Section 5). A copy of the ordinance is attached as Exhibit A.

The validity of the ordinance was first challenged in Mulligan v. Dunne, 61 Ill.2d 544 (1975). In Mulligan, the supreme court held the ordinance valid over various claims of unconstitutionality brought, among others, by the wholesalers of alcoholic beverages.

Observing that plaintiff's argument was directly contrary to its previous decision in S. Bloom, Inc. v. Korshak, 52 Ill.2d 56 (1972), wherein the supreme court found the Chicago cigarette tax constitutional, it rejected plaintiff's assertion that the County liquor tax was an

occupation tax prohibited by Article VII Section 6(e) of the Constitution.

In doing so the Mulligan court reasoned:

> "In Bloom, a similar argument was presented regarding the City of Chicago's cigarette tax ordinance, which, like the present ordinance, specifically provided that the burden of the tax was to be borne by the consumer, but paid by the wholesaler, who would collect it from the retailer, who would in turn collect it from the consumer. We held the city has not passed an occupation tax, since the ordinance clearly placed the legal incidence of the tax upon the consumer, not on the wholesaler or retailer who merely served as collection agents." Id. at 551-52. (Emphasis added.)

Plaintiffs argued Bloom was distinguishable because the liquor tax was more complex than the Bloom cigarette tax in that the liquor tax applied varied taxing rates. The Mulligan plaintiffs also claimed the tax applied to liquor which may never be sold nor was there a

provision for refunds. In response the supreme court stated:

> In our judgment, however, the two taxes [cigarette tax vs. liquor tax] are not distinguishable. While it is true that this tax will be more difficult to pass on to the consumer than the simple 5 cents per package tax on cigarettes, the task is hardly impossible. Nor is the fact that the ordinance makes no explicit provision for refunds of consequence. The tax is clearly levied only on retail sales . . . Consequently, under Bloom, the county liquor tax is not an occupation tax requiring approval of the General Assembly. Id. at 552.

The present plaintiffs, however, claim that the application of the tax will fall squarely within the proscription of an unconstitutional tax as found in Commercial National Bank of Chicago v. City of Chicago, 89 Ill.2d 45 (1982). Commercial dealt with the Chicago service tax ordinance and plaintiffs' claim, among others, that it was a tax upon occupations. The tax was imposed on the purchaser, but

collection and remittance duties were placed on the seller, who was also liable for uncollected taxes.

In a lengthy and scholarly review of the 1970 Constitutional Convention debates, Justice Ryan, writing for the majority, analyzed the constitutionality of the ordinance in its application. The debate centered around the intent of the drafters to include occupation taxes, and the like in Article VII Section 6(e), thus restricting home rule authority to tax in such a manner. Those who spoke in favor of allowing a tax on occupations spoke in terms of a tax primarily on those which provided services. Justice Ryan first concluded that the drafters' intent was explicit and clear that Section 6(e) prohibited a tax on services rendered since the amendment offered favoring same was soundly defeated. (4 Proceedings 3365-3371) The Commercial court, therefore, held

that "it [1970 Constitutional Convention] firmly rejected the idea that a home rule unit should be able to impose occupation taxes as a means of taxing services complimenting the sales tax on tangible personal property." Id. at 57. (emphasis added)

However, Commercial also held that under a home rule taxing power "taxes could be placed upon sales of tangible, personal property and the restrictions of paragraph 4.4 of the report would not affect a taxing power of that nature." Id. at 57. Thus, as this Court understands the holding in Commercial, there is nothing about the language of the ordinance involved in Commercial that would automatically dictate a finding of invalidity if it involved a tax upon tangible, personal property rather than services. Rather it was the belief of the drafters that a tax upon an occupation as a means of taxing services that

complimented a sales tax upon personal property should be prohibited by Section 6(e). Reaching this conclusion does not require a rejection of rulings made in Bloom and its progeny.

Commercial itself distinguishes the above "earlier cases" holding that the taxes therein challenged "fall within the area of taxation which the debates and examples cited above [taxes on gasoline, hotel rooms, liquor, food and drugs] show were understood by the convention to be encompassed within the power to tax." Id. at 58.

Thereafter, reviewing Bloom [cigarette sales tax]; Mulligan [identical liquor sales tax as here being challenged]; Town of Cicero v. Fox Valley Trotting Club, Inc., 65 Ill.2d 10 (1976) [entertainment tax]; Kerasotes Rialto Theater Corp. v. City of Peoria, 77 Ill.2d 491 (1979) [amusement tax]; and Jacobs v. City of

Chicago, 53 Ill.2d 421 (1973) [auto parking tax], the Commercial court found such taxes were "clearly within the scope of the examples set out in the majority committee report." Id. at 59.

Unlike Estate of Carey v. Village of Stickney, 81 Ill.2d 406 (1980), where the amusement tax applied to the occupation of a race track and was imposed on the race track, not spectators, here, as in Bloom, Mulligan and Kerasotes, the legal incidence of the tax is upon the purchaser. Unlike Estate of Carey, the liquor wholesaler is not required to pay the tax. The tax is payable by the consumer; the wholesaler merely is required to collect the tax. In this Court's opinion the fact the ordinance makes it a violation for the dealer to fail to include the tax imposed in the sale price does not mean the tax is an occupation tax upon the wholesaler.

Nor does this Court read Commercial as broadly as plaintiffs suggest. In Commercial, the majority analyzed the effect of the declaration by the City Council that the Chicago service tax was imposed upon the purchaser. The fact that the court was dealing with a tax on services raised suspicions as to the application or effect of the tax beyond its stated purpose. Justice Ryan found a statement by a member of the Committee on Local Government during the Convention debates to be revealing:

> I think that an extension of a sales tax in a municipality to occupations which provide services -- not those which sell tangible personal property at retail . . . - but which sell services would be precluded under the provisions of Section 4.4 [Section 6(e) (2) of Article VII] unless authorized by the General Assembly, because I don't see how you could possibly interpret a tax on those services as anything else than a tax on an occupation. (emphasis added) (4 Proceedings 3154) Id. at 55-56.

Simply put, if the Constitution prohibits a home rule tax on services can any language attempting to make it look different than a tax on services, save it from constitutional invalidity? Obviously not. However, that does not require a finding of invalidity of the ordinance before the Court.

Unlike Commercial, the ordinance under scrutiny here is not one whose purpose falls within the concern expressed by the Committee on Local Government [sic] i.e. a service tax ordinance. In Commercial, the court had to "consider whether a simple declaration that a tax is imposed upon purchasers of services . . . is sufficient to avoid the restrictions imposed by the Constitution." Id. at 65. Observing that ". . . in this case we are not dealing with the kind of a tax that the constitutional convention saw as coming within the unrestricted authority of a home rule

unit," Id. at 65, the supreme court struck down the ordinance since the practical effect of the ordinance was to impose burdens and penalties upon the seller of services equal to that of an occupation tax.

This Court believes Commercial and a successor case, Waukegan School Dist. v. City of Waukegan, 95 Ill.2d 244 (1983), are limited in their application to service tax ordinances containing language whose practical effect is to place a tax upon seller of services although ostensibly taxing the purchaser of the services. Any other interpretation would require a rejection of the Bloom, Mulligan and Kerasotes cases none of which were overruled or even rejected by Commercial. Therefore, the Court holds the Cook County Liquor Tax is not violative of Article VII, Section 6(e) of the Illinois Constitution.

II.

Plaintiff next contends that enforcement of the ordinance violates the Equal Protection Clause in the Fourteenth Amendment to the United States Constitution and Article I Section 2 of the Illinois Constitution. Plaintiff alleges that the County's attempt to collect the tax from it as opposed to the fifteen in-county retailers constitutes an "arbitrary and irrational" application of the ordinance.

The Equal Protection Clause is violated when an ordinance is "applied and administered by [sic] public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights . . ." Yick Wo v. Hopkins, 118 U.S. 356, 373-74, 6 S.Ct. 1064, 1072-73, 30 L.Ed. 220 (1886). Put another way, the ordinance must be applied in a manner which rationally furthers a legitimate state

purpose and thus does not constitute "intentional invidious discrimination by the state against persons similarly situated." Ciechon v. City of Chicago, 686 F.2d 511, 522-23 (7th Cir. 1982).

However, the evidence of discrimination in the present case falls far short of that which sustained such a finding in Ciechon. There the court found clear and convincing evidence that the City orchestrated the termination of only the plaintiff paramedic in order to quell adverse publicity even though her partner was equally responsible for the patient and despite strong evidence that both paramedics had acted properly.

In the instant case, all plaintiff has alleged is that the County could seek reimbursement from the retailers. This is simply insufficient to support a claim of invidious discrimination. The Constitution permits qualitative differences in meting

out punishments and it is not violated simply because one offender suffers a harsher penalty than another. Williams v. Illinois, 399 U.S. 235, 243, 90 S.Ct. 2018, 2023, 26 L.Ed.2d 586, 594 (1970). The rationale behind seeking reimbursement from only one company rather than fifteen companies is self-evident. Furthermore, the ordinance indicates a preference for proceeding first against the wholesaler -- for example, the retailer's duty to directly reimburse the County arises only secondarily when the wholesaler fails to pay.

Nor is there invidious discrimination simply due to the earlier litigation, County of Cook v. Illinois Wine & Spirits, 93 Ill.App.3d 710 (1st Dist. 1981), between the parties over the County's right to inspect plaintiff's records. To so hold would encourage wholesalers to withhold such records in the hope of forcing the

County to seek their production and thereby precluding the County from bringing a collection action.

Therefore, the enforcement of the ordinance against plaintiff does not violate the Equal Protection Clauses.

III.

Plaintiff's next contention is that Cook County can not, under its home rule powers, require an out-of-county wholesaler to collect the tax on in-county sales. Plaintiff argues that such a provision constitutes an extra-territorial tax, which is prohibited by the Illinois Constitution. The Court disagrees. The supreme court recently upheld the validity of the tax against the same challenge:

> (T)he crucial inquiry is not whether home-rule units have extra-territorial powers -- rather, it is whether any local unit of government is exercising its taxing power extra-territorially by collecting a tax from sellers located outside the boundaries of the local unit

> which do business within these boundaries. We think it is not.
>
> Mulligan v. Dunne, 61 Ill.2d 544, 558 (emphasis added).

Although the Mulligan court observed that it was possible that enforcement of the ordinance under another factual situation would raise constitutional questions, such a situation does not exist here. The relationship between plaintiff and its in-county customers is sufficient to meet the due process requirements, that between the home rule unit and the wholesaler, there be "some definite link, a minimum connection." Miller Brothers Co. v. Maryland, 347 U.S. 340, 344-45, 74 S.Ct. 535, 539, 98 L.Ed. 744 (1954).

Plaintiff also asserts that enforcement by County of the ordinance in this case is "inconsistent" with its general enforcement of the ordinance since the County could easily collect the tax from the fifteen in-country retailers.

This argument is without merit. As stated earlier, the retailers have only a contingent duty to reimburse, triggered by a wholesaler's failure to act. Nothing in the ordinance can be construed to limit the County's right to reimbursement in those circumstances to retailers alone. Such an interpretation would create the absurd result of encouraging a wholesaler to violate the ordinance because in so doing it would discharge itself of any obligation to comply. Finally, the County has the power to impose the duty of collection on the wholesaler. See, Beck v. Department of Revenue, 121 Ill.App.3d 666 (1st Dist., [sic] 1984); Rainer National Park Co. v. Martin, 18 F.Supp. 481 (D.C. 1937), reh. den. 23 F.Supp 66, aff'd without op [sic], 302 U.S. 661, 58 S.Ct. 478 (1937).

In construing statutes in relation to the collection of taxes, the Court is to give them a common sense meaning so as to

avoid making collection difficult or impossible. Department of Revenue v. Joseph Bublick & Sons, Inc., 68 Ill.2d 568 (1977). Applying this rule to the instant case, the Court finds that the County's enforcement is consistent with the spirit and letter of the ordinance.

The Court has reviewed the record and the various pleadings, depositions [sic] admissions on file [sic] together with affidavits. It denies plaintiff's Motion for Summary Judgment. It grants Defendant's Motion for Summary Judgment.

Defendant shall draft an Order consistent with the above ruling.

ENTER:

_____
Thomas J. O'Brien

Dated: _____, 1986

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS

Illinois Wine & Spirits, Plaintiff,	)	
v.	)	NO. 82 CH 5963
County of Cook, Defendant.	)	

ORDER

[ENTERED July 10, 1987]

This cause coming on to be heard for decision following trial, both parties being present in court through counsel, the Court having made findings of fact and conclusions of law on the record, orders that:

1) Judgment is entered in favor of Cook County for the reasons stated on the record in the amount of $154,729.12.

2) On oral motion of Illinois Wine the Appeal Bond shall be 1½ times the amount of judgment.

ENTER:

T. O'Brien
Judge

IN THE APPELLATE COURT,
STATE OF ILLINOIS

FIRST DISTRICT

ILLINOIS WINE & SPIRITS CO., an Illinois corporation,	)	
Plaintiff-Appellee,	)	
v.	)	No. 1-87-3567
THE COUNTY OF COOK, BUREAU OF ADMINISTRATION and WILLIAM M. DOYLE,	)	
Defendants-Appellants.	)	

O R D E R

[ENTERED January 2, 1990]

Plaintiff-Appellant's petition for rehearing is denied.

/s/
PRESIDING JUSTICE JAMES C. MURRAY

/s/
JUSTICE FRANCIS S. LORENZ

/s/
JUSTICE MICHEL A. COCCIA

GILBERT S. MARCHMAN, CLERK OF THE
APPELLATE COURT, FIRST DISTRICT

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

April 4, 1990

Mr. Morton Siegel
Siegal, Moses & Schoenstadt
10 E. Huron
Chicago, IL 60611

No. 69822 - Illinois Wine & Spirits Co., petitioner, v. The County of Cook, Bureau of Administration, et al, respondents. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on April 26, 1990.

AN ORDINANCE TO PROVIDE FOR A TAX ON THE RETAIL SALE OF ALCOHOLIC BEVERAGES, APPROVED MAY 5, 1975, AS AMENDED.

BE IT ENACTED BY THE PEOPLE OF THE COUNTY OF COOK, REPRESENTED IN THE COOK COUNTY BOARD:

Section 1

A tax is hereby imposed on the retail sale in Cook County of all alcoholic beverages. Such tax is to be paid by the purchaser and nothing in this Ordinance shall be construed to impose a tax upon the occupation of retail or wholesale alcoholic beverage dealers. This tax shall be levied according to the following schedule:

(a) Wines containing 14% or less alcohol by volume, a tax at the rate of 12¢ per gallon or the pro rata portion thereof.

(b) Wines containing more than 14% alcohol by volume, a tax at the rate of 30¢ per gallon or the pro rata portion thereof.

(c) Alcohol and spirits, a tax at the rate of $1 per gallon or the pro rata portion thereof.

(d) Beer, a tax at the rate of 4¢ per gallon or the pro rata portion thereof.

The ultimate incidence of a liability for payment of the tax herein levied is to be borne by the consumer of said alcoholic beverages.

It shall be deemed a violation of this Ordinance for a retail alcoholic beverage dealer to fail to include the tax imposed herein in the sale price of the alcoholic beverage or to otherwise absorb such tax. The tax herein levied shall be in addition to any and all other taxes.

Except as provisions are made in this Ordinance for the collection of the tax herein levied upon the sale of alcoholic beverages in the possession of retail dealers of alcoholic beverages on the effective date of this Ordinance, the tax herein levied shall be collected by each wholesale dealer of alcoholic beverages who sells alcoholic beverages to a retail dealer of alcoholic beverages doing business in Cook County.

Any wholesale alcoholic beverage dealer who shall pay the tax levied by this Ordinance to the Cook County Collector shall collect the tax from any retail alcoholic beverage dealer to whom the sale of said alcoholic beverages is made, and any retail alcoholic beverage dealer shall in turn then collect the tax from the purchaser of said alcoholic beverages. The tax shall be paid to the person required to collect it as trustee for and on account of the County of Cook.

If any business selling liquor at the retail level shall receive liquor upon which no tax has been collected by the distributor or supplier, then the retail operator shall collect such tax and remit directly to the Cook County Collector within thirty (30) days of the receipt of such liquor.

Section 2

Wholesale alcoholic beverage dealers doing business on effective date of this Ordinance shall register with the Bureau of Administration of Cook County within twenty (20) days after such effective date. A person becoming a wholesale alcoholic beverage dealer after the adoption of this Ordinance shall register with the Bureau within twenty (20) days after the commencement of business. Wholesale alcoholic beverage dealers shall file each month with the County Collector a report of sales of alcoholic beverages in such form as prescribed and furnished by the Bureau. Such report of sales must be mailed in sufficient time to be postmarked on or before the forty-fifth (45th) day from the last day of the month for which return is due. Each report of sales of alcoholic beverages shall be accompanied by a remittance of the appropriate amount of tax

applicable to the sales reported. Payment of the tax imposed herein shall be made to the "Cook County Collector."

Section 3

The Bureau shall prescribe reasonable rules, definitions, and regulations to carry out the duties imposed upon it by this Ordinance. Such rules, definitions, and regulations shall include, but not be limited to, reasonable procedures consistent with existing practices in the wholesale and retail liquor industry, for collection and remittance of the tax herein levied upon the consumer of alcoholic beverages.

The Bureau may appoint wholesale dealers of alcoholic beverages and any other person within or without the County of Cook as agents for the tax herein levied. The Bureau is hereby authorized to grant a commission not exceeding one-half of one percent (0.5%) of the tax due to the

County of Cook to such agent for services rendered in connection with the tax herein levied. Provided, however, that the Bureau is hereby authorized to grant a commission not exceeding one percent (1%) of the tax due to the County of Cook for a special period not exceeding sixty (60) days immediately following the effective date of this Ordinance to cover the cost of the initial inventory required in this Ordinance to be prepared by retail dealers of alcoholic beverages.

Within sixty (60) days after the effective date of this Ordinance every retail dealer of alcoholic beverages doing business in the County of Cook shall file with the Bureau on forms prescribed by it, a sworn inventory of all alcoholic beverages in his possession or control on July 1, 1975. With said inventory the retail dealer of alcoholic beverages shall pay to the Cook County Collector the taxes

due from the retail sale of all alcoholic beverages which were in such retail alcoholic beverage dealer's possession on July 1, 1975, and for which the tax herein levied has not been collected on behalf of the County of Cook by a wholesale alcoholic beverage dealer.

Section 4

The Bureau or such other agency of Cook County Government as it shall designate shall have the right to inspect all books, records, and reports of all retail and wholesale dealers as defined in this Ordinance. Such inspection shall take place only during normal business hours of retail and wholesale alcoholic beverage dealers.

Section 5

Any violation of this Ordinance shall be punishable by a fine or not less than $100 and not more than $1,000 or imprisonment for a period not to exceed six

(6) months, or by both such fine and imprisonment. It shall be deemed a violation of this Ordinance for any person knowingly to furnish false or inaccurate information as required herein. Criminal prosecutions pursuant to this Ordinance shall in no way bar the right of Cook County to institute civil proceedings to recover delinquent taxes, interest and penalty due and owing as well as costs incurred for such proceeding. Civil penalties assessed pursuant to this Ordinance shall not exceed $500 for each offense. For the purpose of this Ordinance, interest shall be computed at the rate of two percent (2%) per month from the first day of delinquency. The tax herein required to be collected by any wholesale or retail dealer pursuant to this Ordinance shall constitute a debt owed by such dealer to Cook County.

Section 6

The tax imposed by this Ordinance is in addition to all other taxes imposed by the Government of the United States, the State of Illinois, or by any unit of local Government.

Section 7

The tax imposed by this Ordinance shall not apply to sales of alcoholic beverages wherein the purchaser is a passenger on an inter-state carrier. Further, the tax herein levied shall not apply to wine intended for use and used by any church or religious organization for sacramental purposes, provided that such wine shall be purchased legally under the laws of Illinois and the United States; but no exemption from this tax is permitted with respect to wine sold to private persons for such purposes.

Section 8

DEFINITIONS:

For the purpose of this Ordinance, whenever any of the following words, terms or definitions are used herein, they shall have a meaning ascribed to them in this section:

(a) ALCOHOLIC BEVERAGE: "Alcoholic beverage" includes alcoholic spirits, wine and beer and any liquid or solid, patented or not, containing alcohol, spirits, wine, or beer, and capable of being consumed as a beverage by a human being. The provisions of this Ordinance shall not apply to alcohol used in the manufacture of denatured alcohol produced in accordance with Acts of Congress and regulations promulgated thereunder, nor to any liquid or solid containing one-half of one percent or less of alcohol by volume.

(b) PERSON means any natural person, trust, court appointed representative, syndicate, association, partnership, firm, club, company, corporation, business trust, institution, agency, Government corporation, Municipal corporation, district or other political subdivision, contractor, supplier, vendor, vendee, operator, user or owner

or any officers, agents, employees, or other representatives acting either for himself or for any other person in any capacity or any other entity recognized by law as the subject of rights and duties; the masculine, feminine, singular or plural, is included in any circumstances.

(c) RETAIL ALCOHOLIC BEVERAGE DEALER: Any person who engages in the business of selling alcoholic beverages in the County of Cook to a purchaser for use or consumption, and not for resale in any form.

(d) WHOLESALE ALCOHOLIC BEVERAGE DEALER: Any person who engages in the business of selling or supplying alcoholic beverages to any person for resale in the County of Cook.

(e) SALE, RESALE, SELLING: Any transfer of ownership or possession or both, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever for a valuable consideration.

(f) BUREAU: Bureau of Administration of Cook County.

(g) COUNTY BOARD: Board of Commissioners of Cook County.

(h) ALCOHOL: "Alcohol" means the product of distillation of any fermented liquid, whether rectified or diluted, whatever

may be the origin thereof, and includes synthetic ethyl alcohol. It does not include denatured alcohol or wood alcohol.

(i) SPIRITS: "Spirits" means any beverage which contains alcohol obtained by distillation, mixed with water or other substances in solution, and includes brandy, rum, whiskey, gin or other spirituous liquors, and such liquors when rectified, blended or otherwise mixed with alcohol or other substances.

(j) WINE: "Wine" means any alcoholic beverage obtained by the fermentation of the natural contents of fruits, or vegetables, containing sugar, including such beverages when fortified by the addition of alcohol or spirits, as above defined.

(k) BEER: "Beer" means a beverage obtained by the alcoholic fermentation of an infusion or concoction of barley, or other grain, malt, and hops in water, and includes, among other things, beer, ale, stout, lager beer, porter and the like.

Section 9

If any one or more of the provisions of this Ordinance is declared unconstitutional or the application thereof

is held invalid, the validity of the remainder of this Ordinance and the application of such provisions to other persons and circumstances shall not be affected thereby.

Section 10

This Ordinance shall take effect and be in force on July 1, 1975.

IN THE APPELLATE COURT,
STATE OF ILLINOIS

FIRST DISTRICT

ILLINOIS WINE & SPIRITS CO., an Illinois corporation,	)	
Plaintiff-Appellee,	)	
v.	)	No. 1-87-3567
THE COUNTY OF COOK, BUREAU OF ADMINISTRATION and WILLIAM M. DOYLE,	)	
Defendants-Appellants.	)	

Appeal From the Circuit Court
of Cook County, Illinois
County Department, Law Division
Honorable THOMAS J. O'BRIEN,
Judge Presiding

BRIEF AND ARGUMENT OF PLAINTIFF-APPELLANT

****

On February 23, 1981, the Appellate Court entered an Opinion affirming the decision of the trial court in part, as to

issuance of the Writ of Mandamus,[1/] but modifying the Order to include production of books and records only for the years specified in the Complaint for Mandamus. (C.4 and 52)

In said Opinion, the Appellate Court sustained the right of the COUNTY to inspect the books and records of IWS and specifically held that the right to inspect did not assume that any future enforcement of the Ordinance would be attempted by the COUNTY under circumstances which would

---

1/ In fact, the COUNTY asserted that it was merely seeking to impose only a minor burden upon IWS consisting of mere inspection of its books and records and represented to the Court, that it was not doing so for purposes of imposition of the Tax upon IWS, but rather, for the purpose of ". . . determining not just whether any ultimate purchaser had avoided the Tax, but whether any retailer or wholesaler has collected the Tax and not transmitted it." (Page 50 of Record on Appeal, 80-0928, Page 10, Memorandum of County in Opposition to Illinois Wine's Motion to Dismiss, in the matter of County of Cook v. Illinois Wine & Spirits, 49 Ill. App. 3d 710, 417 N.E.2d 812 (1981). It is undisputed that IWS did not charge or collect the alleged Tax.

constitute an unlawful exercise of its taxing powers. (C.5 and 53) Furthermore, the Court held that an attempt, if any, by the COUNTY to collect the Tax must await further litigation, at which time IWS' constitutional challenges would be considered. (C.5 and 53)

****

Thereafter, since the COUNTY's Counterclaim had not been deemed moot by the Cross-Motions for Summary Judgment, the trial court heard testimony as to the amount of IWS' tax liability as claimed by the COUNTY. On June 23, 1987, the trial on the COUNTY's Counterclaim was held. (C.604) During said hearing, John Gallagher, Cook County Auditor, testified in summary that: In those situations wherein a Cook County retailer brings liquor into Cook County from a wholesaler outside the County on which the retailer has not paid the Tax, the COUNTY will try

to collect it from the retailer (Tr. 9); the Ordinance specifically requires that where taxes have not been charged or collected by a wholesaler, as in the case at bar, they are to be remitted directly to the COUNTY by the retailer (Tr. 9); the COUNTY has found it more economical to have the wholesaler collect and remit the Tax to the COUNTY, than the retailer (Tr. 9-10); IWS is located outside of Cook County (Tr. 10-11); and the burden of the Liquor Tax is upon the consumer (Tr. 19-20). However, herein, the COUNTY never sought nor attempted collection of the Liquor Tax from any of the retailers, except Zimmerman's Liquors. (Tr. 63) That collection resulted from an audit of Zimmerman's Liquors pursuant to its request for a refund of the Liquor Tax from the COUNTY. (Tr. 29)

****

B.

THE APPLICATION OF THE COOK COUNTY TAX ON THE RETAIL SALE OF ALCOHOLIC BEVERAGES IN THIS INSTANCE CONSTITUTES A VIOLATION OF THE EQUAL PROTECTION CLAUSE AS CONTAINED IN THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION AS WELL AS SECTION 2 OF ARTICLE I OF THE ILLINOIS CONSTITUTION OF 1970.

The trial court erred in not finding that the Liquor Tax, as applied herein, violates the equal protection clauses of the 14th Amendment of the United States Constitution and Article I, §2 of the Illinois Constitution of 1970. The equal protection guarantee means that no person or class of persons shall be denied the same protection of the laws which others similarly situated enjoy. Greene v. L. Fish Furniture Co., 272 Ill. 148, 153, 111 N.E.2d 725 (1916) citing Connolly v. Union Seven Pipe Co., 184 U.S. 540. This proviso not only applies to the enactment of fair and impartial legislation, but of necessity extends to the application of these laws.

U.S. v. Falk, 479 F.2d 616, 618 (1973). This principle was firmly established long ago in the case Yick Wo v. Hopkins, 118 U.S. 356, 373-374 (1886) wherein the Supreme Court stated that:

> "Though the law itself be fair on its face and impartial in appearance. . . if it is applied and administered by [sic] public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

To determine whether the Ordinance violates equal protection guarantees, the Court must apply two tests. First, the Court must determine whether the Ordinance "operates to the disadvantage of a suspect class of infringes upon a fundamental right." Illinois Housing Development Authority v. Van Meter, 82 Ill. 2d 116, 119, 412 N.E.2d 151 (1980). The second test is considered only if the first does not apply. If no suspect classification is

created by the Ordinance, the Court must then determine whether the Ordinance and classifications therein bear a rational relationship to a legitimate governmental interest and whether the classifications are based upon "rational difference(s) of situation or condition found to exist in the persons or facts upon which the classifications rest." Greene, 272 Ill. at 152. See also; Chicago National league Ball Club v. Thompson, 108 Ill. 2d 357, 368, 483 N.E.2d 1245 (1985); and Van Meter, 82 Ill. 2d at 121.

The Supreme Court struck down an Illinois law in Williams v. Illinois, 399 U.S. 235, 241 (1970) as a violation of equal protection guarantees, wherein persons guilty of petty theft were kept in prison beyond their maximum term, when unable to pay the accompanying fine. Though the Supreme Court recognized the wide latitude of the State of Illinois in

fixing the punishment for state crimes and the practice in other states of incarcerating persons for nonpayment, the Court concluded that the practice resulted in "impermissible discrimination" towards indigent prisoners.

The Court went on to state that, on its face, the statute appears to extend to all defendants an equal opportunity for limiting their prison sentence to the one (1) year maximum, provided that persons are able to satisfy the pecuniary fine. However, such is not the case the Court noted, in application. The statute only exposes indigents to the risk of further imprisonment above and beyond the statutory maximum.

Thereafter, in Ciechon v. City of Chicago, 686 F.2d 511 (1982), the Seventh Circuit Court of Appeals ruled that the City had improperly prosecuted and discharged a paramedic from her job,

resulting in a violation of her equal protection and due process rights, when it neglected to charge and prosecute another paramedic involved.

The City, in arguing its case, stated that its decision to charge only one of the paramedics was permissible under the concept of "selective prosecution." The Court of Appeals rejected this defense, stating that selective prosecution is only permissible when it is not based upon such grounds as race, religion, exercise of first amendment rights or bad faith. Evidence presented, however, established that the City's decision to discipline the plaintiff, was not based upon an objective investigation, but on pressure from the patient's family and the media.

Not only did the City's action against the plaintiff not meet the selective prosecution test, it also resulted in a denial of the plaintiff's equal protection

rights due to its arbitrary and irrational nature. At the very least, the Court held, equal protection requires that a municipality apply its laws in a "rational and nonarbitrary way." 686 F.2d at 522. However, to do so, a municipality must be able to show that the practical application of a statute or ordinance furthers some legitimate and articulated state purpose so as not to constitute invidious discrimination.

In the matter at hand, the trial court erroneously held that the COUNTY could choose to punish IWS by requiring remittance of the Tax instead of the fifteen retailers who collected, but never remitted the Tax. The trial court effectively gave no consideration to the actual taxing event. It simply chose to punish IWS for not charging and remitting the Liquor Tax to the COUNTY. This course of action is in direct opposition to the

provisions of the Ordinance. Paragraph 1 of the Ordinance mandates that, in those situations wherein the wholesaler has not charged nor collected the Liquor Tax from the retail licensees, the retail licensees are required to collect such Tax from the consumers and remit it directly to the COUNTY.

Despite this clear and unambiguous language in the Ordinance, the COUNTY has steadfastly refused to seek remittance from said fifteen Cook County Retail Licensees, even though it is admitted by the COUNTY that it has the names and addresses of each said retailer and knows the precise amount of Taxes which each retailer collected from consumers, but never remitted. The COUNTY'S failure to proceed against the retail licensees in light of the uncontested facts herein, and as mandated by the express language of the Ordinance is clear and convincing evidence of the

COUNTY's arbitrary and irrational application of the Ordinance, resulting in the violation of IWS' 14th Amendment and Sec. 2 of Art. I equal protection rights.